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Positional Risk, Forces of Nature, and Workmen's Compensation

Thomas Parker Hayes

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THE OHIO COURTS, in their interpretation of the Workmen's Compensation Law,[1] have attempted to establish clear-cut principles of compensability for the working man when his on-the-job injuries are caused by the forces of nature and acts of God. However, the attempts of the courts to establish rules of compensability fail to provide predictability and consistency. The principles proposed are inadequate to cover all the situations that may arise.

The rule has generally been that injuries which result solely from the forces of nature or acts of God are not compensable from the state insurance fund[1a] If it can be proven however, that the nature of the employment created an increased hazard, or had, in some way, combined with the elements to produce the injury, then recovery will be allowed.[2]

In too many cases the courts have denied benefits to workers whose jobs have placed them in a position of vulnerability to the forces of nature where the specific requirements of increased hazard or of causal connection have not been met. Recovery for the individual who is forced to be subjected to the elements can still be barred by the "assumption-of-the-risk" defense that shielded the employer from liability prior to the enactment of the Workmen's Compensation Act. The remedies available to the man whose duties have carried him out-of-doors and placed him in a position of potential risk should be such that the inconsistencies and inadequacies that presently exist are removed.

All too often the employee has been placed in a position of peril where the likelihood of his being injured by the elements is greatly increased above that of the general public. However, the courts have not always considered the mere placing of an employee in a position of peril sufficient to authorize payment of benefits under the "increased hazards" requirement of the Workmen's Compensation Law.

Compensation should be allowed whenever an employee is forced by his job to subject himself to an unusual extent to the elements.

The criterion of positional risk, or position of peril, would place

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1 Ohio Rev. Code, Ch. 41.

1a Industrial Comm. v. Carden, 129 Ohio St. 344, 195 N.E. 387 (1935); Slanina v. Industrial Comm., 117 Ohio St. 329, 158 N.E. 829 (1927); Johnson v. Industrial Comm., 49 Ohio App. 419, 197 N.E. 387 (1935).

2 Industrial Comm. v. Hampton, 123 Ohio St. 500, 176 N.E. 74 (1931); Jones v. Industrial Comm., 60 Ohio App. 465, 21 N.E. 2d 1014 (1938); Industrial Comm. v. Laraway, 46 Ohio App. 168, 188 N.E. 297 (1933).

compensability for losses due to the elements on a more predictable and consistent basis. The rules for recovery would not vary substantially from case to case or from condition to condition.

Historical Background

Prior to 1910, the employee in the State of Ohio had no source for recovery of compensation for injuries suffered in the course of his employment. He would usually receive compensation only if he had made some personal preparation to protect himself from the financial burden that injury and loss of time from work imposed. The defense, utilized by employers to escape the burden of responsibility, was that the employees "assumed the risk" of injury when they accepted the employment.

The first dent was made in the employer's iron-clad position when the Norris Bill[3] was passed on April 30, 1910. The Norris Bill deprived the employer of the use of the "assumption of the risk" defense when he failed to remedy ordinary defects. It also provided the employee with some possibility of recovery in the event he was slightly negligent in the performance of his job.[4] On May 10, 1910, Senate Bill 250[5] was passed, which provided for a study commission of five men (two from labor, two from industry, and one attorney) to investigate the possibility of a direct compensation law, or other similar law, which would place some liability upon employers for accidental injuries suffered by employees while on the job.[6]

After the passage of Senate Bill 250 in 1910, participation in the Workmen's Compensation program was opened to the employers on a voluntary basis. However, by special election in 1913, an amendment was passed which required compulsory participation in the Workmen's Compensation program by employers of five or more persons. The practice of employee contributions to the fund was also eliminated. This was further revised and amended in 1924 to include employers of three or more persons under the compulsory participation requirements.[7]

Since its inception, the number of claims processed through the Bureau of Workmen's Compensation has reached the level where over 1,200 new claims are received every day and further action is required on at least an equal number of old claims.[8]

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[3] 101 Ohio Laws 195.

[4] J. Young, Workmen's Compensation Law of Ohio, 6 (1963).

[5] 101 Ohio Laws 231.

[6] Young, *op. cit. supra* n. 4.

[7] *Id.* at 8.

[8] Bureau of Workmen's Compensation and Industrial Commission, Handbook of Service and Billing (1962).

Accidental Injury

To obtain benefits from the state insurance fund for losses resulting from the forces of nature or acts of God, the claimant must prove that he has received an accidental injury. The Ohio Workmen's Compensation Act specifically defines what constitutes an accidental injury:

> . . . "Injury" includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment.[9]

The statute further defines what constitutes an injury and provides that an employee who is injured (or his dependents, in the event he is killed), provided the injuries are not self-inflicted, is entitled to receive compensation for losses sustained, as well as medical expenses, and in the event of death, funeral expenses.[10]

Occupational Diseases

Under the Workmen's Compensation Law the regulations and requirements for recovery for losses due to diseases and illnesses differ from the language of the usual "in the course of, and arising out of the employment" formula which is applied when an accidental injury is experienced.

In the area of occupational diseases the statutes are very specific as to what diseases are compensable. If an occupational disease is not specifically named, and if the disease was not contracted in the course of an employment in which the employee was engaged at some time within twelve months previous to the date of the disablement, the disease is not compensable.[11]

Because of the exacting requirements for recovery under these sections, many conditions and illnesses that could befall an employee are not compensable even though they arise out of and in the course of employment. The only provision for such contingencies allowed under the law is that compensation may be obtained for a disease that is peculiar to a certain industry or business, provided that the employee is not subjected to the hazard or condition which produced the disease when he is not engaged in his employment.[12]

Once it is established that an employee has contracted, in the course of his employment, a compensable disease or condition, he is then entitled to the same benefits and compensation available to an employee

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[9] Ohio Rev. Code, sec. 4123.01(c).

[10] *Ibid.*, sec. 4123.54.

[11] *Id.*, sec. 4123.68.

[12] *Id.*

who is injured or killed as a result of an accidental injury received in the course of, and arising out of, his employment.[13]

Strict construction of the statute has barred persons from recovering benefits for diseases they contracted in the course of their employment because their particular condition was not specifically named or they failed to satisfy the requirements that the person is not subjected to the same hazard or condition when he is not engaged in his employment or occupation.

Forces of Nature and Acts of God

In addition to the multitude of claims made each year for accidental injuries and occupational diseases, yet another category of claims has been made for the injuries and deaths that have been attributed to the effects of the forces of nature and acts of God.

> An act of God does not arise out of earthly employment, but if the employment, through its activities, conditions or environments, subjects an employee to a greater hazard from the act of God than that to which the general public in the community is subject, and the employee is injured by the act of God to which he is so subjected, a causal connection between the employment and the injury is thereby established and the case is compensable under the Workmen's Compensation Law.[14]

There has been difficulty in properly categorizing the claims resulting from the forces of nature because there was no provision made for such injuries in the Workmen's Compensation Law. The difficulty arises because the claims may be for injuries of a traumatic nature, such as injury or death resulting from lightning,[15] storms,[16] or ice and snow,[17] or the claim may be for a disease or pathological condition such as heat stroke or heat exhaustion,[18] frostbite,[19] or pneumonia.[20]

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[13] Ohio Rev. Code, sec. 4123.54.

[14] This quote, frequently cited by the courts in cases dealing with claims for injuries received from the forces of nature and acts of God was taken from the Syllabus of the Industrial Comm. v. Carden, *supra* n. 1a.

[15] Industrial Comm. v. Carden, *supra* n. 1a; Industrial Comm. v. Laraway, *supra* n. 2.

[16] Industrial Comm. v. Hampton, *supra* n. 2; Slanina v. Industrial Comm., *supra* n. 1a; Industrial Comm. v. Kovacs, 10 Ohio L. Abs. 248 (1931).

[17] Walborn v. General Fireproofing, 147 Ohio St. 507, 72 N.E. 2d 95 (1947); Brennan v. Keller, 15 Ohio App. 2d 79, 239 N.E. 2d 97 (1968); Barrett Division, Allied Chem. v. Owens, 110 Ohio App. 316, 169 N.E. 2d 435 (1960).

[18] Malone v. Industrial Comm., 140 Ohio St. 292, 43 N.E. 2d 266 (1942); Cavanaugh v. Industrial Comm., 63 Ohio App. 256, 26 N.E. 2d 215 (1939); Ford Motor Co. v. Hunter, 50 Ohio App. 547, 199 N.E. 85 (1935); Johnson v. Industrial Comm., *supra* n. 1a; Kemna v. Industrial Comm., 12 Ohio Ops. 144 (Hamilton County C.P., 1938); Rettig v. Industrial Comm., 9 Ohio Ops. 422 (1937).

[19] Kaiser v. Industrial Comm., 136 Ohio St. 440, 26 N.E. 2d 449 (1940); Moskell v. Industrial Comm., 91 Ohio App. 112, 107 N.E. 2d 543 (1951); Jones v. Industrial Comm., *supra* n. 2.

[20] Johnson v. Industrial Comm., 164 Ohio St. 297, 130 N.E. 2d 807 (1955).

In the absence of statutory provisions to provide a basis for the determination of compensability for injuries or diseases arising out of the forces of nature, the case law has been controlling in these situations. It is noted that much of the law has gone unaltered since the 1930's when a substantial portion of the precedent was established.

The prevailing view has drawn a very fine line between what constitutes a compensable claim under the Workmen's Compensation Law, and what does not. A heavy burden has been placed on the injured employee, (or in the case of death of the employee, on his estate) to show that his claim meets the requirements of compensability.

It has been established that recovery will be barred for a claimant who suffers loss or injury solely as a result of the elements.[21] The courts have also held that the employee is denied recovery if his exposure to the elements presents no greater hazard to himself than that to which the general public is exposed at the same time.[22] One way to qualify for recovery from the state insurance fund for losses resulting from the forces of nature or acts of God is to show that the employee has been subjected to a greater hazard than that to which the general public has been subjected.[23] A second way a claimant qualifies for recovery under the Workmen's Compensation Law for injuries caused by the forces of nature is to prove that the elements did not act alone in producing the injury. In either case there must be a causal connection shown between the employment and the elements that combined to produce the injury.[24]

The ramifications of the aforementioned guidelines can be better understood when viewed in the light of specific cases that have produced these standards.

In June of 1924 a severe tornado struck the northwestern part of the State of Ohio. Two cases arising from this incident have contributed much to the law in this area.

In *Slanina v. Industrial Commission of Ohio*[25] the plaintiff-employee was, in the course of his employment, making deliveries when he sustained injuries as a result of a telephone pole, blown down by the

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[21] Industrial Comm. v. Carden, *supra* n. 1a; Johnson v. Industrial Comm., *supra* n. 1a.

[22] Walborn v. General Fireproofing, *supra* n. 17; Industrial Comm. v. Carden, *supra* n. 1a; Slanina v. Industrial Comm., *supra* n. 1a; Johnson v. Industrial Comm., *supra* n. 1a.

[23] Malone v. Industrial Comm., *supra* n. 18; Industrial v. Carden, *supra* n. 1a; Cavanaugh v. Industrial Comm., *supra* n. 18; Industrial Comm. v. Laraway, *supra* n. 2; Industrial Comm. v. Kovacs, 10 Ohio Law Abs. 248 (1931).

[24] Malone v. Industrial Comm., *supra* n. 18; Industrial Comm. v. Carden, *supra* n. 1a; Industrial Comm. v. Hampton, *supra* n. 2; Ford Motor Co. v. Hunter, *supra* n. 18; Industrial Comm. v. Laraway, *supra* n. 2.

[25] *Supra* n. 1a.

storm, striking the car in which he was riding. In its decision the Supreme Court of Ohio did concede that:

> . . . the fact that the injury was caused by the act of God does not, however, necessarily deprive the injured party of the right to recovery . . . if the employe's [sic] duties exposed him to some special danger not common to the public.[26]

The court denied this particular plaintiff recovery under the Workmen's Compensation Act. It held that although the plaintiff was injured in the course of his employment, as a result of the elements, he had been exposed to no greater risk than had the general public at that particular time and place. The Court, in its opinion, mentioned that Slanina's duties required him to make the required deliveries without regard for the weather conditions, but did not seem to consider that he might have sought refuge from the storm had it not been for his employment requiring his performance of his duties.

The second case arising out of the same tornado was *Industrial Commission of Ohio v. Hampton*[27] in which the decedent was a yard foreman whose duties called him to a storage warehouse, where he was loading a truck when the tornado struck. The decedent, and others, sought refuge in the warehouse, and when the storm leveled the building, he was crushed to death. In finding for Hampton, the court stated that if he had been caught out-of-doors and thrown against a tree or a building, he would have been subject to the same hazards as was the rest of the community and the claim would have been barred as not being due to any hazard peculiar to the employment. Since the collapse of the building was the proximate cause of his death, the rule that injuries which are a result of a combination of the elements and the employment are compensable would apply. This latter view of compensability where the elements and the employment combine to produce the injury is found in *Industrial Commission v. Kovacs*[28] where the plaintiff was injured when a tent, in which he sought refuge from a storm, collapsed, and caused a fracture of his skull and also affected his hearing. The court distinguished this case from *Slanina* by saying that Kovacs had no other immediate protection from the storm, whereas, the general public most likely would have had adequate protection. Hence, the rule that the plaintiff was subjected to a greater hazard than the general public was applied and compensation was allowed.

In cases involving the effect of lightning, the general principle that an act of God operating by itself to produce the injury is not compensable, is followed closely as in the tornado cases. An employee's death, from being struck by lightning, was deemed not to be the result of his

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[26] *Id.* at 333.

[27] *Supra* n. 2.

[28] *Supra* n. 16.

employment because there was no evidence showing a causal connection between the employment and being struck by lightning[29] although testimony did show that prior to being struck, the decedent had been carrying a steel shovel. The court asserted that, had he been carrying the shovel at the time he was struck by lightning, recovery would have been allowed because the steel shovel would have increased the likelihood of such injury, and hence, the requirement of a causal connection would have been met.[30] In that case recovery was defeated by the lack of evidence to show whether the decedent was actually carrying the steel shovel at the time he was struck.

The value and importance of expert testimony in cases of this type was discussed by the court in *Industrial Commission of Ohio v. Laraway,*[31] where recovery was allowed in a case for the employee being struck by lightning because he was sweaty and carrying a broom with steel bristles. This was said to increase the hazard of the employment and expose the employee to dangers to which the general public was not exposed. Although the case dealt specifically with claims for losses due to the elements, it was an elaboration of the principle that there should be some causal connection between the job and the injury set forth in *Industrial Commission of Ohio v. Weigandt*[32] some twelve years before when the court was discussing compensability for accidental injuries generally.

Another area of claims resulting from the elements is that of claims which arise from slips and falls due to ice and snow. The same rule that applies to hazards common to the general public with regards to other injuries caused by the elements is applied to these cases in *Walborn v. General Fireproofing Co.*[33] In that case the plaintiff sustained a fractured pelvis when he slipped and fell on the ice and snow that had fallen the previous night in the company parking lot. The claim was disallowed when the court held that the hazard of ice and snow in the parking lot was no different than that which was experienced by the general public throughout the rest of the city on that particular morning. It would be expected that the hazards from ice and snow would not be compensable, generally, for the very reason cited above, however, the courts have allowed recovery from the state insurance fund under certain conditions which differ somewhat from the "increased hazards" and "causal connection" requirements found in the cases of storms and lightning. It has been held that injuries resulting from falls on ice and snow on sidewalks leading to and from the place of employment are

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[29] Industrial Comm. v. Carden, *supra* n. 1a.

[30] *Ibid.*

[31] *Supra* n. 2.

[32] 102 Ohio St. 1, 130 N.E. 38 (1921).

[33] *Supra* n. 17.

compensable under the Workmen's Compensation Law if these sidewalks provide the sole means of ingress and egress, or where such way is maintained by the employer.[34] Recovery may also be obtained when defects in such routes to and from the site of the employment are obscured by a natural accumulation of snow,[35] or even where a force of nature, in the form of slush, makes a natural hazard in the sidewalk more active, especially where use of the particular sidewalk was required to travel to and from the situs of the employment.[36]

To this point this discussion has focused on injuries which are traumatic in origin. Another way in which nature works a hardship on the employee is by causing pathological conditions as a result of extreme heat or excessive cold. In claims arising from illnesses or pathologies caused by temperature variations, it is found that the same general rules apply and that heat or cold acting alone on the worker will not support recovery. There must be an increased hazard to the employee or a causal connection between the forces of nature and the particular employment to permit recovery for the injured worker from the state insurance fund.

In cases where excessive heat is the causative factor in producing the resultant pathology, or death, many terms are utilized by the courts, but the nature of these conditions may be categorized as either heat stroke or as heat exhaustion.

When the resulting disorder is heat stroke, there has been a failure of the heat elimination system of the body created by a breakdown of the sweating mechanism. The pathological picture shows primary damage to the central nervous system, with edema, and in severe cases, destruction of nerve cells of the cerebral cortex as a result of increased body temperature to a level above 105 degrees. All untreated cases are fatal, and even if proper treatment is instituted, but is not soon enough, severe brain damage will result.[37]

In contrast to this, heat exhaustion is a nonfatal disturbance of physiological function where vasomotor control and cardiac output are not adequate to keep up with increased skin circulation. With fainting being the predominant symptom,[38] the chief concern to the workmen's compensation field would be for the claims arising out of injuries sustained by striking something when the worker falls. There may be, however, cardiac and vascular diseases that may manifest themselves, as a result of heat exhaustion.[39]

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[34] Stevens v. Industrial Comm., 145 Ohio St. 198, 61 N.E. 2d 198 (1946).

[35] Barrett Div. v. Owens, *supra* n. 17.

[36] Brennan v. Keller, *supra* n. 17.

[37] Cecil & Loeb, Textbook of Medicine, 477, 10th Ed. (1959).

[38] *Id.* at 476.

[39] *Ibid.*

In *Johnson v. Industrial Commission of Ohio*[40] the court denied a claim for the death of the plaintiff's husband from the effects of sunstroke. There the court held that his duties as a canvassing salesman subjected him to no greater hazard than that to which the general public had been exposed, basing its decision on the principle that had been announced in the *Slanina* case.[40a]

The opposite result was reached in the case of *Kemna v. Industrial Commission of Ohio*,[41] where the decedent, serving as a night watchman, was required to cover, in a period of one hour, a distance of close to two miles, through ten buildings, up and down twenty-four flights of stairs and check in at twenty-six clock stations, with the temperature four or five degrees over the official temperature registered in the city, which had been above 100 degrees for a period of four or five days. The court found for the plaintiff, holding that the death of the decedent resulted from the extreme state of the elements working in combination with the hazards of the employment to satisfy the requirements of causal connection between the elements and industry.

The principles of increased hazard and causal connection were also applied in a case where the employee collapsed and subsequently died after loading 100 pound sacks of cement onto a truck in temperatures that reached 104 degrees. The court, in finding for the plaintiff, based its decision on the opinion that the general public was not subjected to such strenuous work in the midst of such excessive heat. It was not the heat itself, nor was it the strenuous work alone that caused the death of the decedent, but it was the combination of the elements and the employment which constituted a situation to which the public was not exposed.[42]

Even though cases of heat stroke involve a disease process or physiological dysfunction within the body, the cases now under consideration, to be compensable, must be classified as accidental injuries. To be compensable as diseases they would have to be specifically named in the statutes as occupational diseases. The conclusion of accidental injury has been reached by the courts by finding some unusual happening that will take the case out of the category of the normal day-to-day hazards of the business. One such example was found in the case of *Ford Motor Co. v. Hunter*.[43] There the claimant suffered heat exhaustion when the breakdown of an automatic air pressure regulator made it necessary for the employee to stand over an air compressor and operate the regulator manually and, thereby, be subjected to temperature levels in ex-

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[40] Johnson v. Industrial Comm., *supra* n. 1a.

[40a] *Supra* n. 25.

[41] 12 Ohio Ops. 144 (1938).

[42] Cavanaugh v. Industrial Comm., *supra* n. 18.

[43] *Supra* n. 18.

cess of 120 degrees. The question of compensability rests on the determination of physical harm or damage to the body based on more than mere suspicion of connection between the forces of nature and the hazard of the job.[44]

Contrary to *Johnson v. Industrial Commission of Ohio*[45] is the case of *Rettig v. Industrial Commission of Ohio*[46] where an employee suffered sunstroke. There the employee, a maintenance man, was wheeling gravel down a path between a cement walk and a low building, with another building at the end of the path. At the time the man was stricken the temperature was 108 degrees. Evidence was introduced to show that the location of the buildings and the path cut off circulation in the area as well as raising the temperature of the area by as much as fifteen degrees above the already extreme heat. In its decision the court noted:

> Most of the cases where recovery is permitted upon the theory of accidental injury and sunstroke are grounded upon the proposition that factors growing out of the employment other than the normal forces of nature contributed materially to the injury of which complaint was made.[47]

The compensability of losses caused by extreme heat has not been restricted to extreme conditions of natural heat. In *Malone v. Industrial Commission of Ohio,*[48] the decedent was required to carry ladles of molten lead to casting moulds and was thereby subjected to artificial heat of about 113 degrees. Recovery was granted from the state insurance fund on the basis that an unforeseen, unexpected and unusual event had accomplished the intentional actions of the workman to produce the injury. Therefore, the employee was subjected to a greater hazard than was the general public and his injury was considered to be accidental in character and result.

Exposure to extreme heat is only half of the problem that results from the variations of temperature in Ohio. Another group of claims arises as a result of workers being exposed to the cold and freezing of the winter season.

The first problem encountered is that of frostbite. It can be described as a freezing of the tissues with mechanical disruption of the cellular structure from exposure to cold air, usually at a temperature level below thirty degrees. If the condition is detected early, conservative treatment should be sufficient. However, if frostbite is deep, sepsis and gangrene may necessitate amputation of the affected part.[49]

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[44] *Ibid.*

[45] *Supra* n. 1a.

[46] 9 Ohio Ops. 422 (1937).

[47] *Id.* at 424.

[48] *Supra* n. 18.

[49] Cecil & Loeb, *op. cit. supra* n. 37 at 1340.

When surgical intervention was required on a worker who had contracted frostbite of the right foot because his duties of cleaning out a ditch required him to keep his right foot immersed in freezing water, the Court of Appeals found that his injury and loss was compensable.[50] In reaching their decision the court held that if there was a causal relation between the injury and some unusual, unforeseen and unexpected occurrence that takes place while the workman is acting in the course of his employment, it is compensable. The fact that the workman had to stand with his right foot in freezing water was held to be a hazard that was not commonly experienced by the other persons of the community. Therefore, the increased hazard of his employment combined with the forces of nature to produce his injury.

In the case of *Kaiser v. Industrial Commission of Ohio*[51] the claimant experienced freezing of his feet while working as an attendant at a gasoline station. The injury occurred in December of 1929 and Kaiser received compensation from the state insurance fund in 1931 for the freezing of the right foot. However, disability was not noticed in the left foot until sometime in 1936. The claim was disallowed because the two year statute of limitations had elapsed. However, the court stated the principle that accidental injuries from freezing were compensable, when the exposure to cold weather placed the employee in a position of greater risk than that to which the other members of the community were exposed.

The exposure of an employee to the elements has been shown to be compensable when a causal connection between the elements and the job is found to have produced an accidental injury. This was carried one step further in *Moskell v. Industrial Commission of Ohio*.[52] There compensation was allowed an employee who had become permanently disabled because working in cold water deep enough to run into his boots had aggravated a pre-existing arthritic and cardiac condition.

Up to this point it has been shown that weather conditions may be classified as a contributing cause of "accidental injuries" under the Workmen's Compensation definition. To categorize their effects as "occupational diseases," would not provide compensation because these effects are not specifically enumerated in Section 4123.68 of the Ohio Revised Code.[53] When considering the occupational disease claims, the procedure is at its conclusion once the Industrial Commission has labeled something an occupational disease, for there is no right to appeal to the

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[50] Jones v. Industrial Comm., *supra* n. 2.

[51] *Supra* n. 19.

[52] *Supra* n. 19.

[53] Industrial Comm. v. Middleton, 126 Ohio St. 212 (1933); Industrial Comm. v. Franken, 126 Ohio St. 176 (1933).

Court of Common Pleas of classifications of occupational diseases under the Workmen's Compensation Law.[54]

This has a direct bearing on the subject at hand, for in the case of *Johnson v. Industrial Commission of Ohio*[55] the decedent contracted pneumonia as a result of having to unload railroad cars on a cold and rainy day when the wind was blowing and the temperature was near freezing. In ruling on this appeal the court said:

> . . . a workman's weakened resistance to infection from pneumonia, even though it may represent a derangement of his bodily functions cannot be considered an injury within the meaning of the Workmen's Compensation Act.[56]

In arriving at that decision the court has classified pneumonia as a non-compensable occupational disease, and the claimant is also barred from the right to make further appeal to the courts.

Therefore, not only must the elements act in combination with the employment to produce the loss, but also the loss must be such that it will be classified as an "accidental injury" within the meaning of the definition set forth by the statutes under the Workmen's Compensation Laws.

Conclusion

It has been shown that simply because the forces of nature or an act of God have played a part in causing an injury to a workman in the course of his employment, he is not precluded from recovering compensation under the provisions of the Workmen's Compensation Act. It is found that if the elements or an act of God are the sole causative factors of the injury, then no remedy is available for the employee from the state insurance fund. However, if the nature of the employment subjects the employee to increased hazard from the elements or if there is a causal connection between the forces of nature and the employment, the combination of which produces the resulting injury, then the loss is compensable.

It was mentioned earlier that a fine line seems to be drawn between what claims are and are not allowable in a given situation. The line becomes almost impossible to discern when different forces of nature are involved.

In the first instance it was shown that when two men were engaged in the duties of their employment and were killed by lightning, the fact that one man was carrying a steel-bristled broom made his death a job related accident. Since the other man was not carrying a metal implement at that moment, his claim was disallowed. When a man

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[54] Szekeley v. Young, 174 Ohio St. 213, 188 N.E. 2d 424 (1963).

[55] *Supra* n. 20.

[56] *Id.* at 309.

sustains an injury from a tornado because his job requires him to be out making deliveries regardless of the weather conditions, he is denied recovery because he is subjected to no greater hazard than the public at large. Another man's death, however, was considered to be job-related because he was inside a company warehouse when the tornado leveled the building in which he had sought refuge. The line is very fine indeed between a warehouse and a delivery vehicle.

Upon consideration of claims of unlike causative factors, the differentiation becomes even less clear. A canvassing salesman whose duties demand he be out in the heat is said to have suffered no job related loss when he suffers sunstroke because all the population is subjected to the same heat. A gas station attendant who must be out in the cold to sell gasoline has, however, suffered a compensable loss when he contracts frostbite. However, it must be remembered that if the same gas station attendant had contracted pneumonia from the exposure to the cold instead of frostbite, he would have been considered to have gotten an occupational disease that is not compensable because it was not enumerated by the statute.

In the application of the established precedent to cases involving the forces of nature, or acts of God, to a loss that could readily be compared to an already established and decided situation the results would be fairly predictable. However, each case presents a new and different set of facts and circumstances, and many cases do not readily lend themselves to being fitted into an already established mold.

Medical research is investigating the possibility that excessive exposure to the sun may be a causative factor in the production of cancer of the skin. If this is found to be true, it would be questionable whether or not a lifeguard, or other worker whose duties required prolonged exposure to the sun, would be compensated if he were to develop skin cancer, or even if secondary infection from a severe sunburn was experienced. The result is unpredictability in attempting to decide whether such a loss would be considered to have been an accidental injury occurring in the course of, and arising out of the employment, or an occupational disease not specifically enumerated by the statute, or merely another hazard common to the general public.

Another unanswered problem would arise in the case of a man who worked around a building in the winter time and suddenly receives severe injuries when snow and ice slides down, or breaks loose from the roof and comes crashing down upon him. Would the courts grant him recovery for his injuries as they have done in certain instances of slips and falls on company sidewalks that are covered with snow, or would they assert that the likelihood of any member of the community receiving the same injury be just as great, thus denying him recovery from the state insurance fund?

It is, therefore, submitted that steps should be taken to establish a doctrine of positional risk[57] for claims resulting from the forces of nature and acts of God. The courts would then have a consistent basis for the determination of compensability in these cases; they would not have to search for some increased hazard or causal connection to grant recovery. For compensability, it would be determined whether or not the requirements of a man's employment caused him to be subjected to forces of nature to which he would have been likely to have subjected himself if he were not required to do so by his employment.

Under such a doctrine, determination of whether or not benefits would be conferred for losses would be based on what the "reasonable man" would be most likely to do under the circumstances.

The principles of compensability set forth by this method would give a more consistent approach in deciding whether benefits would be paid from the state insurance fund. The test would be whether the "reasonable man" would be likely to expose himself to the specific peril that the forces of nature create at that particular time and place.

This test could be applied equally well to any of the forces of nature that have been discussed here and a more predictable and consistent result could be obtained.

For example, where compensation was denied a man who fell victim to sunstroke because his duties required him to be out making sales calls all day, the question should not be whether he was subjected to a greater hazard than was the general public, but whether, because of his job requirements, he was forced to be subjected to the sun and heat of the day to a greater degree than he, or the general public, would likely have subjected themselves voluntarily.

It would also seem unlikely that a reasonable man would voluntarily subject himself to a whole day of being outside on a cold, windy and rainy day and run the risk of contracting pneumonia. Yet, under the present Workmen's Compensation Law, if his job forces him to be exposed to such weather conditions it is merely said that he has acquired a non-compensable occupational disease and no recovery is available to him, or his family, in case of his death.

It is equally unlikely that a reasonable man would not seek shelter from an impending tornado or electrical storm. However, when the duties of his employment demand that he continues to work in the elements, recovery is decided by the unworkable principles of "increased hazard" and "causal connection."

Here in the State of Ohio the man whose work carries him out-of-doors may be subjected to almost any of the forces of nature, varying from

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[57] See United Service Insurance v. Donaldson, 254 Ala. 204, 48 So. 2d 3 (1950) and Katz v. A. Kadans & Co., 232 N.Y. 420, 134 N.E. 330 (1922).

extreme heat to excessive cold, as well as the devastating force of a tornado or the electrical potential of lightning. The man who suffers physical loss because his job places him in a position of jeopardy from the elements should not be forced to suffer the added financial burden that the fine line of the law might now create in deciding who is to collect benefits from the state insurance fund.

Rather than continue with the present inconsistencies relative to claims arising from injuries sustained at the hands of the elements, the clearer and more consistent method of determining compensability is application of positional risk as a basis for liability.